STATE OF MICHIGAN

COURT OF APPEALS

BRENT ROBERT SPARR,

Plaintiff-Appellant,

v

GENERAL GROWTH MANAGEMENT, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

MCKENNEY CONTRACTING,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 14, 2006

No. 258686
St. Clair Circuit Court
LC No. 03-002936-NO

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant/third-party plaintiff General Growth Management.[1] This case stems from plaintiff's slip and fall in a mall parking lot owned by defendant. The lower court concluded that the ice on which plaintiff slipped was an open and obvious danger. We affirm.

Plaintiff argues that summary disposition was inappropriate because reasonable minds could differ regarding whether the danger of slipping on ice was open and obvious.[2] We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary

[1] The lower court also entered an order dismissing with prejudice defendant's claim against third-party defendant McKenny Contracting. This order was subsequently amended pursuant to MCR 2.602(B)(3) and reentered as a dismissal without prejudice.

[2] Plaintiff's reliance *Kenny v Katz Funeral Home*, 264 Mich App 99; 689 NW2d 737 (2004), is misplaced in light of our Supreme Court's recent reversal of this Court's decision. *Kenny v Katz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005).

disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

It is clear that plaintiff was a business invitee on defendant's property. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). A landowner owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not encompass open and obvious dangers unless special aspects of the condition make the risk unreasonably dangerous. *Id.* The determination of whether an alleged dangerous condition is open and obvious focuses on the characteristics of a reasonably prudent person. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004). The test is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). "Because the test is objective, this Court 'look[s] not to whether plaintiff should have known that the [condition] . . . was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Id*. at 238-239, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Finally, a premises owner can be liable for an open and obvious condition if special aspects of that condition create "an unreasonably high risk of severe harm." *Lugo, supra* at 518.

It had snowed in the area the day before plaintiff was injured. Plaintiff testified that he arrived at the mall in the late afternoon and observed that the parking lot was covered with approximately one inch of snow and, in his opinion, had not been "taken care of." Plaintiff admitted that there is more likely to be ice in a parking lot that has not been properly cleared. Plaintiff further testified that it had been snowing on and off all day and that it was snowing when he arrived at the parking lot. We belive an average person of reasonable intelligence could easily observe the danger of slipping on the accumulated precipitation under these circumstances. See *Joyce*, *supra* at 239-240. Accordingly, we conclude that danger of slipping on ice was open and obvious.

Finally, there are no special aspects of the ice that make the risk of harm unreasonably high. In *Lugo*, the Court noted that an "open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm." *Lugo, supra* at 518. If such special aspects exist, a premises owner can be liable despite the open and obvious nature of the condition. *Id*. at 519. In *Lugo*, the Court provided two examples of open and obvious conditions that are unreasonably dangerous: a condition creating a risk of death or serious harm such as a thirty-foot pit in a parking lot, or a condition that is unavoidable such as where the only route to exit a commercial building is covered in standing water. *Id*. at 518. The danger presented by the patch of ice in issue is not like either of these examples. See *id*. at 520 (observing "that typical open and obvious dangers . . . do not give rise to these special aspects"). A fall on an ordinary parking lot does not present an unusual risk of death or serious

bodily harm. Moreover, the condition was avoidable, as demonstrated by the fact that plaintiff used a different route to access the store when exiting his car.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot